No. 10-979

In The
Supreme Court of the United States

FLORIDA DEPARTMENT OF AGRICULTURE
& CONSUMER SERVICES,
AND FLORIDA COMMISSIONER OF AGRICULTURE
CHARLES BRONSON,

Petitioners,

v.

TOBY BOGORFF, ROBERT BOGORFF, TIMOTHY FARLEY, BETH GARCIA, ROALD GARCIA, ROBERT PEARCE, AND BARBARA PEARCE, AS REPRESENTATIVES OF THE CERTIFIED CLASS

Respondents.

On Petition for Writ of Certiorari
to the Fourth District Court of
Appeal of Florida

BRIEF FOR THE RESPONDENTS' IN OPPOSITION

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QUESTION PRESENTED

Whether Florida law requiring just compensation for the taking of healthy citrus trees presents an independent adequate state ground precluding federal review and whether that Florida law requiring just compensation conflicts with *Miller v. Schoene*, 276 U.S. 272 (1928).

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STATEMENT OF JURISDICTION

Petitioner mistakenly asserts that the decision below conflicts with *Miller v. State Entomologist*, 146 Va. 175 (Va. 1926). Pet. 1. It meant to write *Miller v. Schoene*, 276 U.S. 272 (1928), this Court's review of the Virginia decision. As we demonstrate below, there is no conflict, nor is there any important but unanswered federal question presented by the decision below. Most importantly, the decision below rests on an independent, adequate state law ground – the Florida Constitution – thus precluding any review by this Court.

STATEMENT OF THE CASE

Between 2000 and 2006, the Florida Department of Agriculture and Consumer Services destroyed over 100,000 healthy, residential citrus trees in Broward County, Florida which were not infected with citrus canker. These residential trees were sacrificed under the Citrus Canker Eradication Program ("CCEP") to protect Florida's commercial citrus industry. Florida law entitles homeowners to seek full compensation for the destruction of their healthy, uninfected, residential citrus trees under the CCEP. Broward County Homeowners sued the Florida Department of Agriculture and Consumer Services and its Commissioner, Charles Bronson (collectively, the "Department") to recover full compensation for the taking of their private property for a public purpose. The trial court granted summary judgment of liability on the homeowners' claim under §581.1845, Fla. Stat., and following a non-jury trial, found the Department liable in inverse condemnation. A jury later awarded the Broward County Homeowners $11,531,463.00 in aggregate compensation for their trees (before setoffs). In October 2008, the Broward circuit court awarded prejudgment interest, and entered final judgment in favor of the Broward

County Homeowners for $8,043,541.50.

Homeowners' tree appraisal expert Eric Hoyer, a certified consulting arborist, opined that the Broward County Homeowners' uninfected citrus trees had compensable value. The Department also recognized the compensable value of the Broward County Homeowners' trees. Deputy Commissioner Craig Meyer told the citrus canker task force that $200 would be "way low" for the value of residential citrus trees to be destroyed. Connie Riherd, Assistant Director of the Department's Division of Plant Industry ("DPI"), concluded that $361 was the value of the majority of healthy trees to be destroyed, and $791 would be the value for the largest trees.

Broward County Homeowners' tree appraisal expert also testified that replacement cost is the proper method for calculating damages in this takings case: "Trees are appraised generally for their cost of replacement and *not* in diminution of real estate . . . ." (emphasis added). Another registered tree appraiser agreed. When appraising residential citrus trees, tree appraiser John Harris appraises the value of the tree itself, *not* the value of the residential property as a whole. DPI Assistant Director Riherd, who performed the research regarding the value of healthy citrus trees to be destroyed, concluded that "replacement cost" was the most appropriate formula to determine the value of residential citrus trees, choosing that method over several others, including one measuring the decrease in the homeowners' real property.

Department witnesses conceded that canker never threatened the food supply and did not present a threat to humans or animals. The Department also never warned or advised the public to avoid eating fruit from canker-infected trees, and no one outside the Department ever characterized

citrus canker as a "public nuisance." The trial court found the Department's actions constituted a taking of compensable property, and that its public nuisance, lack of compensable value and intervening cause defenses did not defeat the Broward County Homeowners' right to recover full compensation. The trial court also concluded that replacement cost was the proper method for determining damages in this takings case for the destruction of a few residential trees on each property. After judgment was entered on the jury verdict, the Department appealed and the Florida Fourth District Court of Appeal affirmed the verdict and the damages awarded. *Bogorff*, Pet. App. 1a-16a.

ARGUMENT

The Petitioner contends that the decision below conflicts with *Miller v. Schoene*, 276 U.S. 272 (1928). Pet. 16. There is no conflict with *Miller*, and because the decision below rests on an independent adequate state ground, there is no jurisdiction in this Court.

A. The Independent Adequate State Ground

The decision below rejected the Petitioner's argument that the Florida legislature did away with "inverse condemnation of citrus trees and replaced it with an exclusive statutory claim." *Dep't of Agriculture & Consumer Services v. Bogorff*, Pet. App. 3a (footnote omitted). The court's response was that "more than a half century ago in *State Plant Board v. Smith*, 110 So.2d 401 (Fla. 1959), a case involving a predecessor agency of [Petitioner] DACS also destroying healthy trees, the [Florida Supreme] court made very clear that 'where, as here a [constitutional] provision for just compensation is a clear requisite to the act of destructions,"' the legislature cannot limit compensation. *Bogorff*, Pet. App. 10a (first two

brackets added). The court below continued:

> Then again, little more than 20 years ago, in *Mid-Florida Growers I*, [adv. *Dep't of Agriculture and Consumer Services*, 521 So. 2d 101 (Fla. 1988)] another case also involving a state agency's destruction of healthy citrus plants to eradicate a plant disease, the supreme court reaffirmed *State Plant Board* in holding that constitutional just compensation "was a clear requisite . . . to the act of destroying healthy trees." 521 So. 2d at 104. Even more emphatically, the court added: "Because article X, §6 Fla. Const. is self-executing, it is immaterial that there is no statute specifically authorizing recovery for loss.' 521 So. 2d at 104 n.2.

Bogorff, Pet. App. 11a.

Article X, section 6(a) of the Florida Constitution provides: "No private property shall be taken except for a public purpose and with full compensation therefor paid to each owner or secured by deposit in the registry of the court and available to the owner." The Florida Supreme Court has consistently adhered to the Florida constitutional mandate in a long string of canker cases, from *State Plant Board*, and *Mid Florida Growers* through *Haire v. Florida Dep't of Agriculture and Consumer Services*, 870 So. 2d 774 (Fla. 2004) and *Patchen v. Florida Dep't of Agriculture and Consumer Services*, 906 So. 2d 1005 (Fla. 2005).

In *Patchen*, the Florida Supreme court quoted *Haire* quoting *State Plant Board's* quotation from an even earlier case: "Thus the Citrus Canker Law sets a compensation floor that is consistent with the established principle that the 'determination of what is just compensation . . . is a judicial function that cannot be performed by the legislature.' [State

Plant Board] quoting *Spafford v. Brevard County*, 92 Fla. 617, 110 So. 451, 454 (1926))". *Patchen*, 906 So. 2d at 1008. *State Plant Board* undeniably rested on Article X, section 6 of the Florida Constitution. 521 So. 2d at 104, n.2. *Spafford* rested on the pre-1968 Florida constitution's due process and takings/just compensation clause. *Spafford*, 110 So. at 619.

The decision below followed these Florida constitutional precedents: "If the compensation required by the Constitution exceeds a statutory amount, the State will have to pay that amount. *Bogorff*, Pet. App. 12a.

Because the decision below rested on Florida law, this Court is without jurisdiction. Even if one sought to find a Fifth Amendment takings component to the decision below, jurisdiction would still be lacking. "[T]he case is controlled by the settled rule that where the judgment of a State court rests upon two grounds, one of which is federal and the other nonfederal in character, our jurisdiction fails if the nonfederal ground is independent of the federal ground and adequate to support the judgment." *Fox Film Corp. v. Miller*, 296 U.S. 207, 210 (1935).

Here, the nonfederal ground is the only ground upon which the decision below rests, and the "well established principle of federalism that a state decision resting on an adequate foundation of state substantive law is immune from review in the federal courts" applies. *Wainwright v. Sykes*, 433 U.S. 72, 81 (1977). *See also Zacchini v. Scripps Howard Broadcasting Co.*, 433 U.S. 562, 566 (1977); *Wilson v. Loew's Inc.*, 355 U.S. 597 (1958).

Certiorari should be denied.

B. There is No Conflict with *Miller v. Schoene*

In *Miller v. Schoene*, 276 U.S. 272 (1928), the Court upheld the Cedar Rust Act of Virginia against a claim that the statute violated the due process clause of the Fourteenth Amendment. The Court held that "the state does not exceed its constitutional powers by deciding upon the destruction of one class of property in order to save another which, in the judgment of the legislature, is of greater value to the public." *Id.* at 278. It also rejected the argument that the Cedar Rust statute was vague: "The objection of plaintiffs in error to the vagueness of the statute is without weight." *Id.* at 281.

Thus *Miller* has no bearing upon the Florida court's holding that the Florida Constitution's just compensation clause requires payment for the taking of healthy citrus trees. Florida did not exceed its powers in interpreting its Constitution to mandate compensation. *Miller* simply held that a "state does not exceed its constitutional powers by deciding upon the destruction of one class of property in order to save another which, in the judgment of the legislature, is of greater value to the public." *Id.* at 279. The Court found the state's social policy decision did not constitute "any denial of due process." *Id.* at 280.

Because *Miller* does not address a state's decision to provide just compensation for taking healthy trees as part of its social (and constitutional) policy, *Miller* does not pose any conflict with the decision below.

C. There is No Important Unanswered Question of Federal Law

Nor does the ultimate question in this case – whether Florida's decision to provide just compensation under its Constitution – present any important but unanswered federal question. The Petitioner's submission that *Bogorff* must be reversed because "[w]hen a state is unable to act effectively to combat a plant pest, agriculture suffers, the food supply is threatened, and the federal government may have to step in" (Pet. 22) is pure hyperbole.

Neither the decision below, nor the litany of Florida decisions leading to it, support the Petitioner's submission. The law is clear in Florida that the State *is* able to act effectively to combat a plant pest. The law is also clear that when the State does so act and takes healthy, useful private property in order to carry out its mission, it must compensate the property owners.

Florida's food supply is alive and well, and federal forces need not be poised for entry because Florida follows its Constitution.

CONCLUSION

This Court should not "step in" to review this case. Established federal law precludes review of the decision below. Certiorari should be denied.

Respectfully submitted,

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